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## Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

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## CURRENT DEVELOPMENTS

### NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

On August 13, 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (Norms)<sup>1</sup> in its Resolution 2003/16.<sup>2</sup> The Norms represent a landmark step in holding businesses accountable for their human rights abuses and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights, humanitarian law, international labor law, environmental law, consumer law, anticorruption law, and so forth.

Throughout the past half century, states and international organizations have continued to expand the codification of international human rights law protecting the rights of individuals against governmental violations. In parallel with increasing attention to the development of international criminal law as a response to war crimes, genocide, and other crimes against humanity, there has been growing attention to individual responsibility for grave human rights abuses. The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful nonstate actors in the world, that is, transnational corporations and other business enterprises. With power should come responsibility,<sup>3</sup> and international human rights law needs to focus adequately on these extremely potent international nonstate actors.

Transnational corporations evoke particular concern in relation to recent global trends because they are active in some of the most dynamic sectors of national economies, such as extractive industries, telecommunications, information technology, electronic consumer goods, footwear and apparel, transport, banking and finance, insurance, and securities trading. They bring new jobs, capital, and technology. Some corporations make real efforts to achieve international standards by improving working conditions and raising local living conditions. They certainly are capable of exerting a positive influence in fostering development.

Some transnational corporations, however, do not respect minimum international human rights standards and can thus be implicated in abuses such as employing child laborers, discriminating against certain groups of employees, failing to provide safe and healthy working conditions, attempting to repress independent trade unions, discouraging the right to bargain collectively, limiting the broad dissemination of appropriate technology and intellectual property, and dumping toxic wastes. Some of these abuses disproportionately affect developing countries, children, minorities, and women who work in unsafe and poorly paid production jobs, as well as indigenous communities and other vulnerable groups.

<sup>1</sup> Sub-Commission on the Promotion and Protection of Human Rights [hereinafter Sub-Comm’n], Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), *available at* <<http://www.unhchr.ch/hnml/menu2/2/55sub/55sub.htm>> [hereinafter Norms].

<sup>2</sup> Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Comm’n Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, at 52 (2003), *available at* <<http://www.unhchr.ch/hnml/menu2/2/55sub/55sub.htm>> [hereinafter Res. 2003/16].

<sup>3</sup> Mary Robinson, Second Global Ethic Lecture, University of Tübingen, Germany (Jan. 21, 2002), *at* <<http://www.ireland.com/newspaper/special/2002/robinson>> (Robinson was high commissioner for human rights at that time).

There is also increasing reason to believe that greater respect for human rights by companies leads to greater sustainability in emerging markets<sup>4</sup> and better business performance.<sup>5</sup> For example, observance of human rights aids businesses by protecting and maintaining their corporate reputation, and creating a stable and peaceful society in which they can prosper and attract the best and brightest employees.<sup>6</sup> Moreover, consumers have demonstrated that they are willing to pay attention to standards and practices used by a business that observes human rights and may even boycott products that are produced in violation of human rights standards.<sup>7</sup> Similarly, there is evidence that a growing proportion of investors is seeking to purchase shares in socially responsible companies.<sup>8</sup> All in all, business enterprises have increased their power in the world.<sup>9</sup> International, national, state, and local lawmakers are realizing that this power must be confronted, and that the human rights obligations of business enterprises, in particular, must be addressed.

Prior to the Sub-Commission's action in August 2003, several other prominent international bodies had considered these issues in either unsuccessful or voluntary initiatives. For example, the United Nations unsuccessfully attempted to draft an international code of conduct for businesses in the 1970s and 1980s.<sup>10</sup> The Organisation for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.<sup>11</sup> In 1977 the International Labour Organization (ILO) adopted its Tripartite

<sup>4</sup> A large-scale study of evidence from developing countries found that emerging market companies gain financially from stability. IFC [International Finance Corp.], *Sustainability, Ethos Institute, Groundbreaking Report Challenges Conventional Wisdom on Role of Business in Emerging Markets*, Press Release 02/0098 (July 17, 2002), at <<http://www.sustainability.com/news/press-room/DevelopingValue-press-release.pdf>>.

<sup>5</sup> See ROGER COWE, *INVESTING IN SOCIAL RESPONSIBILITY: RISKS AND OPPORTUNITIES* (ABI Research Reports, 2001) (supporting the proposition that corporate social responsibility has a positive impact on businesses by increasing their potential for competitive advantage and increasing shareholder value through promotion of risk management); see also Daniel Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 98 (2002) (human rights protection properly encourages investment).

<sup>6</sup> See CHRISTOPHER L. AVERY, *BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE* (Amnesty International 2000), at <<http://www.business-humanrights.org/Avery-Report.htm>>; see also United Nations High Commissioner for Human Rights, *Business and Human Rights*, at <<http://www.unhchr.ch/global.htm>> (visited Sept. 2, 2003).

<sup>7</sup> For example, consumer discontent that soccer balls/footballs were made by children led to a consumer boycott that forced the manufacturers to stop using child labor. Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111 (1998). Another example concerns infant formula. Certain companies were encouraging mothers in developing countries to use infant formula instead of breast feeding. Feeding with formula led to increased infant mortality because the mothers lacked clean water and were not properly instructed in the use of the product. Once consumers learned about the increased infant mortality, they began boycotting Nestlé products. Nancy E. Zelman, *The Nestlé Infant Formula Controversy: Restricting the Marketing Practice of Multinational Corporations in the Third World*, 3 TRANSNAT'L L. 697 (1990).

<sup>8</sup> The ethical market share in the United Kingdom grew by 15% from 1999 to 2000. DEBORAH DOANE, *TAKING FLIGHT: THE RAPID GROWTH OF ETHICAL CONSUMERISM* (2001), available at <[http://www.neweconomics.org/gen/z\\_sys\\_publicationdetail.aspx?pid=88](http://www.neweconomics.org/gen/z_sys_publicationdetail.aspx?pid=88)>. A study in the United States found that one out of every eight professionally managed investment dollars is used in socially responsible investing. SOCIAL INVESTMENT FORUM, 2001 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES (Nov. 28, 2001), at <<http://www.socialinvest.org/areas/research/trends/2001-Trends.htm>>. FTSE4Good, an independent global indexing company, announced that companies in its Global Resources Sector will have to meet higher human rights criteria starting in September 2003. *FTSE4Good Index Series Raises the Hurdle on Human Rights*, FTSE NEWSAND VIEWS, at <[http://www.ftse.com/about\\_ftse/newsandviews/humanrights.jsp](http://www.ftse.com/about_ftse/newsandviews/humanrights.jsp)> (stating that "[t]he new tougher criteria were developed using a broad public human rights consultation carried out during 2002") (visited Sept. 2, 2003).

<sup>9</sup> A 1999 study found that fifty-one of the one hundred largest economies in the world are corporations, while only forty-nine are countries and the combined sales of the world's top two hundred corporations are greater than a quarter of the world's economic activity. SARAH ANDERSON & JOHN CAVANAGH, *TOP 200: THE RISE OF CORPORATE GLOBAL POWER* (1999), at <<http://www.ips-dc.org/reports/top200text.htm>>.

<sup>10</sup> Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1990/94; see also Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984) [hereinafter Draft UN Code].

<sup>11</sup> Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises*, June 21, 1976, 15 ILM 969 (1976). The OECD updated these Guidelines in 2000. For the current version, see OECD Guidelines for Multinational Enterprises (Oct. 31, 2001), available at <<http://www.oecd.org/>> [hereinafter OECD Guidelines].

Declaration of Principles Concerning Multinational Enterprises,<sup>12</sup> which calls upon businesses to follow the relevant ILO conventions and recommendations. Further, in January 1999, United Nations Secretary-General Kofi Annan proposed a "Global Compact" of shared values and principles at the World Economic Forum.<sup>13</sup> The Global Compact asks businesses voluntarily to support and adopt nine core principles, which are divided into categories dealing with general human rights obligations, standards of labor, and standards of environmental protection.<sup>14</sup> These various initiatives, however, failed to bind all businesses to follow minimum human rights standards.

The Norms are the first nonvoluntary initiative accepted at the international level. Accordingly, the Norms have already attracted the attention of many scholars and others who are working in the field of corporate social responsibility. Also for this reason, the Norms have been welcomed by many nongovernmental organizations (NGOs) and others who would like to use the Norms to begin holding large businesses accountable for their human rights violations. This Current Development Note briefly traces the efforts of the Sub-Commission's Working Group on the Working Methods and Activities of Transnational Corporations that led to the adoption of the Norms. This Note also discusses several of the main issues resolved in preparing the Norms, and current and future approaches to implementing them.

### I. DRAFTING HISTORY OF THE NORMS

The idea for a sessional Working Group on the Working Methods and Activities of Transnational Corporations arose from Sub-Commission Resolution 1997/11,<sup>15</sup> which asked El-Hadji Guissé to present a working document to the Sub-Commission at its fiftieth session (in 1998) on the issue of human rights and transnational corporations.<sup>16</sup> In response to this paper, in its Resolution 1998/8 of August 20, 1998, the Sub-Commission decided "to establish,

<sup>12</sup> International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 ILM 422, para. 6 (1978), *available at* <<http://www.ilo.org/public/english/employment/multi/tridecl/index.htm>> [hereinafter ILO Tripartite Declaration]. The Tripartite Declaration is voluntary. *Id.*, para. 2 ("The aim of this Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make . . .").

<sup>13</sup> Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), UN Doc. SG/SM/6448 (1999). Prior to adoption of the Norms, the staff of the Global Compact issued a statement of July 24, 2003, in support of the Norms, indicating that

we always welcome efforts that help to clarify complex human rights questions and that foster practical changes that advance understanding and good practices. [We] understand[] that the Draft Norms have already initiated significant educational efforts and we are looking forward to seeing how these efforts could contribute positively to the Global Compact.

E-mail from Georg Kell (July 24, 2003) (on file with author). That statement responded to a letter from four major participants, which stated their concern to their partners in the Global Compact that companies are being allowed to sign onto the Global Compact without having to follow through with reporting obligations. Letter from Jeremy Hobbs, Oxfam International; Irene Kahn, Amnesty International; Michael Posner, Lawyers Committee for Human Rights; and Kenneth Roth, Human Rights Watch, to Louise Fréchette, deputy secretary-general of the United Nations (Apr. 7, 2003) (on file with author); *see also* GRI Chief Executive Responds to Release of the UN Sub-Commission on the Promotion and Protection of Human Rights Norms for Transnationals (Aug. 13, 2003) (on file with author) (stating that "The Global Reporting Initiative (GRI) has welcomed the work of the [Sub-Commission], which it sees as a further step in catalysing and focusing discussion on how human rights can be advanced around the world in measurable, concrete and practical ways.").

<sup>14</sup> The principles are that businesses should (1) support and respect the protection of internationally proclaimed human rights within their sphere of influence; (2) make sure they are not complicit in human rights abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) eliminate all forms of forced and compulsory labor; (5) abolish child labor; (6) eliminate discrimination in respect of employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies. The Global Compact, *at* <<http://www.unhchr.ch/global.htm>> (visited Sept. 2, 2003).

<sup>15</sup> Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-ninth Session, Res. 1997/11, UN Doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).

<sup>16</sup> Sub-Comm'n, Working Document on the Impact of the Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights, UN Doc. E/CN.4/Sub.2/1998/6.

for a three-year period, a sessional working group of the Sub-Commission, composed of five of its members, taking into account the principle of equitable geographic distribution, to examine the working methods and activities of transnational corporations.<sup>17</sup> The mandate of the sessional working group included tasks such as identifying issues, examining information regarding the effects of transnational corporations on human rights, examining investment agreements for their compatibility with human rights agreements, making recommendations regarding the methods of work and activities of transnational corporations in order to ensure the protection of human rights, and considering the scope of the state's obligation to regulate transnational corporations.<sup>18</sup>

In 1999 the working group set its agenda for the next two years. The 1999 meeting ended by asking David Weissbrodt to prepare a draft code of conduct for transnational corporations.<sup>19</sup> At its second meeting, in August 2000, the working group considered the first "Draft Code of Conduct for Companies,"<sup>20</sup> and further recognized the necessity of addressing issues such as implementation in conjunction with the substantive standards. The session ended by asking for further comments and input regarding the draft standards so that they could be revised and updated for another year.

Accordingly, members of the working group organized a seminar in March 2001 at the Office of the UN High Commissioner for Human Rights. The participants included members of the working group; representatives of NGOs interested in corporate responsibility, human rights, development, and the environment; representatives of companies and unions; and several scholars.<sup>21</sup> Individuals at the conference suggested many substantive formatting changes for the Norms, such as adding a preamble, radically shortening the main text into

<sup>17</sup> Sub-Comm'n, *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, UN Doc. E/CN.4/Sub.2/RES/1998/8.

<sup>18</sup> *Id.*

<sup>19</sup> Sub-Comm'n, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its First Session*, UN Doc. E/CN.4/Sub.2/1999/9. See generally David Weissbrodt & Muria Kruger, *Business and Human Rights*, in *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 421* (Morten Bergsmo ed., 2003).

<sup>20</sup> Sub-Comm'n, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its Second Session*, UN Doc. E/CN.4/Sub.2/2000/12, paras. 26–58. For drafts of the documents considered by the working group in 2000, see Sub-Comm'n, *Principles Relating to the Human Rights Conduct of Companies*, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1; Sub-Comm'n, *Proposed Draft Human Rights Code of Conduct for Companies: Addendum*, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1; Sub-Comm'n, *Proposed Draft Human Rights Code of Conduct for Companies: Addendum, List of Principal Source Materials for the Draft Code of Conduct for Companies*, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.2. The working group has changed the title of this document many times in the drafting process. The first draft was called "Draft Code of Conduct for Companies." UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1, *supra*. But those in attendance at the 2000 Sub-Commission meeting felt that the term "code of conduct" was overused and might be misleading, as many voluntary codes also referred to themselves as "codes of conduct." *Id.*, para. 27. The second draft was entitled "Draft Universal Human Rights Guidelines for Companies," UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1 [hereinafter 2001 Draft Guidelines]. The term "universal" was suggested at a March 2001 seminar of experts convened to gather input on the guidelines. See generally Sub-Comm'n, *Report of the Seminar to Discuss UN Human Rights Guidelines for Companies*, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3, available at <<http://www1.umn.edu/humanrts/links/draftguidelines-ad3.html>> [hereinafter Seminar Report]. At the 2001 Sub-Commission meeting, however, it was felt that the term "guidelines" was not indicative of the nature of the obligations the draft was meant to convey, so the word "principles" was considered preferable. Further, since "companies" was not deemed inclusive of all business forms and the working group's mandate included a special focus on transnational corporations, the suggested title became "Draft Universal Human Rights Principles for Transnational Corporations and Other Business Enterprises." In February 2002, the working group added "responsibilities" to reflect the nature of the obligations concerned but later excluded references to "universal" and potentially "fundamental," as the name was becoming quite long. The third draft considered by the Sub-Commission in 2002 was therefore "Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises," UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1. At that meeting, the working group dropped the word "principles" in an attempt to shorten the name and attached a revised version to its report, entitled "Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights." Sub-Comm'n, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations*, UN Doc. E/CN.4/Sub.2/2002/13 [hereinafter 2002 WG Report].

<sup>21</sup> Seminar Report, *supra* note 20.

broad provisions, and adding a commentary following each principle to deal with more specific issues.<sup>22</sup> Then, at its third meeting, in August 2001, the working group considered a second draft of the document revised in light of the comments received throughout the year, including the suggestions made at the March seminar.<sup>23</sup>

Since the working group had not completed its tasks pursuant to its three-year mandate, the Sub-Commission decided in August 2001 to extend the mandate for another three years. The renewed mandate, while substantially similar to its predecessor, clarified the authority of the working group to draft relevant norms and included new activities, such as compiling a list of human rights instruments and norms in relation to transnational corporations; contributing to the drafting of human rights norms pertaining to transnational corporations and other economic units whose activities have an impact on human rights; and analyzing and drafting norms for the establishment of a monitoring mechanism that would apply sanctions to transnational corporations when appropriate.<sup>24</sup>

Pursuant to the renewed mandate, the working group continued to draft the Norms. At an informal meeting in February 2002, the five members of the working group<sup>25</sup> created a further revised version for consideration at its meetings during the fifty-fourth session of the Sub-Commission in July–August 2002. The new draft consisted of eighteen fundamental human rights principles with regard to the activities of transnational corporations and other business enterprises, including provisions on implementation and a section on definitions. For the first time, the Norms and Commentary on the Principles (Commentary) were submitted as separate documents at the Sub-Commission's fifty-fourth session.<sup>26</sup>

By the end of its meetings at this session, the working group attached a revised version of the Norms (taking into account comments made at the group's meetings) to its 2002 report, with the aim of promoting dissemination of the document.<sup>27</sup> Resolution 2002/8 of the Sub-Commission asked that the Norms and Commentary be disseminated as widely as possible, so as to encourage governments, intergovernmental organizations, nongovernmental organizations, transnational corporations, other business enterprises, unions, and other interested parties to submit suggestions, observations, or recommendations.<sup>28</sup> The working group also attached the Norms to its report in the expectation of approving them in 2003 and sending them to the Sub-Commission, and eventually the Commission, for adoption.

<sup>22</sup> The suggestion to shorten the text into broad substantive provisions and then follow each provision with a commentary was adopted and incorporated into the 2001 draft. The approach was based on the structure of several other UN human rights instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), GA Res. 40/33, annex, UN GAOR, 40th Sess., Supp. No. 53, at 207, UN Doc. A/40/53 (1985). Additionally, the order of subjects in the draft was reformulated to follow the somewhat analogous provisions in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 UNTS 195, 5 ILM 352 (1966) [hereinafter *Racial Discrimination Convention*].

<sup>23</sup> Sub-Comm'n, Draft Universal Human Rights Guidelines for Companies, Introduction, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1; 2001 Draft Guidelines, *supra* note 20; Sub-Comm'n, Draft Universal Human Rights Guidelines for Companies: Addendum 2, Draft Universal Human Rights Guidelines for Companies with Source Materials, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.2; Seminar Report, *supra* note 20.

<sup>24</sup> Sub-Comm'n, The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/RES/2001/3, para. 4(c).

<sup>25</sup> The five members then and at present are Miguel Alfonso-Martínez (Cuba), El-Hadji Guissé (Senegal), Vladimir Khartashkin (Russia), Soo-Gil Park (South Korea), and David Weissbrodt (United States).

<sup>26</sup> Three members of the working group submitted the Commentary: Vladimir Khartashkin, Soo-Gil Park, and David Weissbrodt. Sub-Comm'n, Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises with Commentary on the Principles, UN Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2. The working group lacked sufficient time for a comprehensive review of the Commentary to the Norms at its three-day meeting in February 2002.

<sup>27</sup> Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, in 2002 WG Report, *supra* note 20, at 15–21.

<sup>28</sup> Sub-Comm'n, The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, UN Doc. E/CN.4/Sub.2/RES/2002/8.

In March 2003, several NGOs organized a seminar in which they provided the working group's members with detailed comments on the Norms. During that seminar, the working group received and responded to each issue raised by the NGOs in attendance. Immediately following the seminar, meeting in a private session, the working group considered all the comments received from the seminar and pursuant to the dissemination requested in Resolution 2002/8. The working group then agreed on a draft of the Norms to present at the fifty-fifth session of the Sub-Commission in July–August 2003.<sup>29</sup>

During its meetings at the fifty-fifth session, the working group resolved the key issue of the status of the Commentary to the Norms: the preamble to both the Norms and the Commentary would refer to the Commentary as a "useful interpretation and elaboration of the standards contained in the Norms."<sup>30</sup> Then, after taking into consideration all the suggestions received at its public meetings in 2003, the working group adopted a revised version of both the Norms and the Commentary and forwarded the Norms to the Sub-Commission for approval.<sup>31</sup>

The Sub-Commission deliberated on the Norms and approved them in its Resolution 2003/16 of August 13, 2003.<sup>32</sup> Resolution 2003/16 also transmitted the Norms to the Commission on Human Rights for eventual consideration and asked the Commission to invite governments, United Nations bodies, specialized agencies, NGOs, and other interested parties to provide it with comments on the Norms for its session in March–April 2005.<sup>33</sup> In addition, the resolution creates an initial procedure for implementation of the Norms. The working group is to receive information from governments, NGOs, business enterprises, individuals, groups of individuals, and other sources on the negative impacts of businesses, and especially data on the implementation of the Norms. After inviting each business concerned to respond to the information received, the working group is to transmit its comments and recommendations to the relevant business, government, or NGO.<sup>34</sup> The resolution further asks the working group to continue discussions exploring additional procedures for implementation, such as the other mechanisms identified in general terms in the Norms and Commentary.<sup>35</sup>

At the 2003 meetings of both the working group and the Sub-Commission, many NGOs and others made public statements in support of the Norms, including Amnesty International; Christian Aid; Human Rights Advocates; Human Rights Watch; the Lawyers Committee for Human Rights; the Fédération Internationale des Ligues des Droits de l'Homme; Forum Menschenrechte (Human Rights Forum); Oxfam; the Prince of Wales International Business Leaders Forum; World Economy, Ecology and Development; and the World Organization Against Torture. Additionally, Amnesty International submitted a list of fifty-eight NGOs confirming their support for the Norms, and Forum Menschenrechte presented another list of twenty-six NGOs joining its statement of support.

Immediately upon adoption of the Norms, many of the NGOs listed above issued a press release welcoming the Sub-Commission's action.<sup>36</sup> A few NGOs have already indicated their intent to begin using the Norms as standards for reporting on the human rights activities of

<sup>29</sup> Norms, *supra* note 1; Sub-Comm'n, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 [hereinafter Commentary].

<sup>30</sup> Norms, *supra* note 1, pmb.; Commentary, *supra* note 29, pmb.

<sup>31</sup> Sub-Comm'n, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations, UN Doc. E/CN.4/Sub.2/2003/13.

<sup>32</sup> Res. 2003/16, *supra* note 2, para. 1.

<sup>33</sup> *Id.*, paras. 2–3.

<sup>34</sup> *Id.*, para. 5.

<sup>35</sup> *Id.*, para. 7.

<sup>36</sup> Non-Governmental Organizations Welcome the New UN Norms on Transnational Businesses (Aug. 13, 2003) (on file with author).

businesses.<sup>37</sup> Further, several transnational businesses have agreed to "road test" the Norms as part of their commitment to human rights.<sup>38</sup>

The adoption of the Norms is clearly a milestone for the working group, the Sub-Commission, and many others working on corporate social responsibility. The Norms and Commentary, however, require further efforts with regard to implementation and enforcement, and the working group and others will continue to address these issues in the future.

As for the future of the Norms and Commentary in the UN system, even though the Commission is expected to receive comments on them in time for its sixty-first session in 2005, much educational work for businesses, unions, and governments remains to be done before the Commission is likely to begin seriously considering or adopting the Norms and Commentary.

## II. ISSUES RAISED IN PREPARING HUMAN RIGHTS NORMS FOR BUSINESSES

Several issues arose during the drafting process of the Norms: (1) how to define transnational corporations; (2) whether to include domestic enterprises and, if so, how to distinguish between domestic and international businesses; (3) how to distinguish between larger and smaller businesses, so as to avoid a one-size-fits-all approach; (4) what human rights concepts to include; and (5) how to characterize the legal status of the Norms after their adoption by the Sub-Commission.<sup>39</sup>

### *Defining Transnational Corporations*

When the working group met in both 2000 and 2001, it deliberated at some length as to whether the Norms should apply only to transnational corporations or to all businesses. Additionally, at the 2002 Sub-Commission meeting some NGOs asserted that the original mandate mentioned only transnational corporations and that the working group should therefore focus exclusively on these businesses. Members and observers at the meetings who wanted the Norms to apply only to transnational corporations suggested several possible definitions of such corporations. Before making its decision, the working group requested an account of different definitions used for "transnational corporations" and how other organizations had addressed this issue in their codes of conduct and similar documents. Preliminary research indicated that drafting an adequate definition would be difficult.<sup>40</sup>

<sup>37</sup> Amnesty International and Christian Aid began using the draft Norms as the basis for their assessment of business conduct and campaign efforts even before the Norms were adopted.

<sup>38</sup> The aim of the "Initiative for Respect in partnership with Mary Robinson and the Ethical Globalisation Initiative... is to show leadership within the business sector on how human rights can be incorporated into the centre of the CSR [corporate social responsibility] and Governance debates." E-mail from John Morrison to David Weissbrodt (Aug. 26, 2003) (on file with author); see also John Morrison, *Business and Human Rights*, NEW ACADEMY REV., Spring 2003, at 8. The seven founding companies of the initiative are ABB, Barclays Bank, National Grid Transco, Novartis, Novo Nordisk, MTV, and The Body Shop International. During their first meeting in Zurich in June 2003, the group agreed that one of the priorities should be to "road test" the Norms.

<sup>39</sup> The Norms also represent an important step in applying international law to business enterprises as nonstate actors. In taking that step, the Norms build upon such foundations as the Universal Declaration of Human Rights, GA Res. 217A (III), Dec. 10, 1948, UN Doc. A/810, at 71 (1948), which applies not only to states, but also to such "organs of society" as businesses; the responsibilities under humanitarian law imposed on armed opposition groups as nonstate actors; the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277; and individual criminal responsibility (including for corporate officers) established by the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* (1998), 37 ILM 999 (1998), corrected through May 8, 2000, by UN Doc. CN.177.2000.TREATIES-5; as well as increasing responsibilities voluntarily assumed by businesses under the OECD Guidelines, note 11 *supra*; the ILO Tripartite Declaration, note 12 *supra*; and the Global Compact, note 14 *supra*. Space limitations prevent us from addressing that issue in greater detail.

<sup>40</sup> As one author stated, "Strangely, there is no agreed definition for a '[trans]national corporation.'" Alejo José G. Sison, *When Multinational Corporations Act as Governments: The Mobil Corporation Experience*, in PERSPECTIVES ON CORPORATE CITIZENSHIP 166, 166 (Jörg Andriof & Malcolm McIntosh eds., 2001).



Generally, the term "transnational corporation" refers to a corporation with affiliated business operations in more than one country.<sup>41</sup> A more specific definition deems an enterprise a transnational corporation if "it has a certain minimum size, if it owns or controls production or service plants outside its home state and if it incorporates these plants into a unified corporation strategy."<sup>42</sup> According to yet another definition, a transnational corporation is "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy."<sup>43</sup>

Another term commonly used to describe businesses that operate in more than one country is "multinational enterprise" (MNE). One author, in distinguishing between an MNE and a transnational corporation, defines an MNE as an entity "composed of free-standing units replicated in different countries," and a transnational corporation as consisting of vertically integrated units that produce goods and provide services in more than one country.<sup>44</sup> Additionally, the term "enterprise" is generally viewed as more inclusive than the term "corporation," since for the most part "corporation" refers only to businesses that possess a legal charter and state recognition and excludes unincorporated entities such as partnerships and joint enterprises.<sup>45</sup>

The ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy defines a multinational enterprise to include "enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based." The declaration further states that "this Declaration does not require a precise legal definition of multinational enterprises; [rather, the foregoing definition] is designed to facilitate the understanding of the Declaration and not to provide such a definition."<sup>46</sup> The OECD similarly defines "multinational enterprises" in its Guidelines for Multinational Enterprises: "These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. . . . Ownership may be private, state or mixed."<sup>47</sup>

The Draft UN Code of Conduct on Transnational Corporations defines a transnational corporation as

an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise

<sup>41</sup> WERNER FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS* 20-23 (1972); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 153 (1996) (citing Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 749 n.1); Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS* 553, 553 n.1 (Philip Alston ed., 1999) ("The simplest definition of a multinational corporation is 'an enterprise which owns or controls production or service facilities outside the country in which it is based'.").

<sup>42</sup> Luzius Wildhaber, *Some Aspects of the Transnational Corporation in International Law*, 27 NETH. INT'L L. REV. 79, 80 (1980).

<sup>43</sup> Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740 (1970) (quoting Raymond Vernon, *Economic Sovereignty at Bay*, FOREIGN AFF., Oct. 1968, at 110, 114).

<sup>44</sup> Sison, *supra* note 40, at 168.

<sup>45</sup> Vagts, *supra* note 43, at 740. Arghyrios Fatouros has proposed the following definition of a transnational enterprise: "a complex of legally discrete entities (i.e., companies), established in several countries, forming a single economic unit (enterprise), which engages in operations transcending national borders under the direction of a sole decision-making center." Arghyrios A. Fatouros, *Transnational Enterprise in the Law of State Responsibility*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 361, 362 (Richard B. Lillich ed., 1983); *see also* TRANSNATIONAL CORPORATIONS: INTERNATIONAL LEGAL FRAMEWORK 227 (Arghyrios A. Fatouros ed., 1987); David Bergman, *Corporations and ESC Rights*, in *INTERNATIONAL HUMAN RIGHTS INTERNSHIP PROGRAM*, CIRCLE OF RIGHTS 485, 490 (2000).

<sup>46</sup> ILO Tripartite Declaration, *supra* note 12, para. 6.

<sup>47</sup> OECD Guidelines, *supra* note 11, pt. 1, para. 3.

a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.<sup>48</sup>

The main concern about drafting the Norms so as to apply only to transnational corporations was that an inadequate definition of “transnational corporation” or “multinational enterprise” would allow businesses to use financial and other devices to conceal their transnational nature, and thus to avoid responsibility under the Norms. The Norms specifically define a “transnational corporation” as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.”<sup>49</sup> The Norms, however, do not limit their application to transnational corporations but also include other business enterprises. The working group defines the phrase “other business enterprise” as “any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.”<sup>50</sup>

Hence, even though the Norms define transnational corporations and focus some attention on transnationals, they are written to include all business entities,<sup>51</sup> regardless of their stated corporate form or the international or domestic scope of their business. Its breadth de-emphasizes the definition of transnational corporations and does not restrict the Norms’ scope of application.

### *Distinguishing Between Domestic and International Businesses*

As seen above, the definition of transnational corporations was raised in part by the need to decide whether the Norms should apply only to transnational corporations or to both domestic and international business entities. “Transnational corporations,” however defined, generally attract special attention because they tend to be large, politically influential, and autonomous to the extent that they can move their operations from one country to another. But many other businesses engage in activities related to international commerce, for example, through export or import, even if they lack foreign subsidiaries. Other businesses that operate locally are linked to international commerce and transnational corporations through supply chains. Further, the most influential businesses may be principally active in local or national markets but may have a significant impact on the enjoyment of human rights.

To address this issue, the Draft UN Code of Conduct on Transnational Corporations states that the code was not intended to introduce differences between domestic and international enterprises but that “[w]herever the provisions are relevant to both, transnational corporations and domestic enterprises should be subject to the same expectations in regard to their conduct.”<sup>52</sup> The ILO Tripartite Declaration contains a similar statement:

The principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. Multinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular.<sup>53</sup>

<sup>48</sup> Draft UN Code, *supra* note 10, para. 1(a).

<sup>49</sup> Norms, *supra* note 1, para. 20.

<sup>50</sup> *Id.*, para. 21. A member of the working group provided this definition for the document and it was accepted by the group at its March 2002 meeting.

<sup>51</sup> See *infra* note 57. The Norms focus on transnational corporations because those large businesses raise the greatest international concern and are the least susceptible to national regulation.

<sup>52</sup> Draft UN Code, *supra* note 10, para. 4.

<sup>53</sup> ILO Tripartite Declaration, *supra* note 12, para. 11.

The OECD Guidelines handle this issue by defining transnational corporations but then stating that “[t]he Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.”<sup>54</sup> The OECD Guidelines further state that “[w]hile it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines recommendations to the fullest extent possible.”<sup>55</sup>

A basic principle of the Norms is that they should be respected by all businesses. Since all businesses are essentially competitors in the global market, making distinctions between the standards that should apply to transnational corporations and those that should apply to smaller domestic firms could prove difficult.<sup>56</sup> Additionally, it could be difficult to determine the wholly national or international status of corporations and other types of businesses with diverse control structures and forms of ownership, such as nonequity contractual relations (joint ventures, buyers/suppliers, among others), partnerships, limited liability partnerships, limited liability companies, and unincorporated associations. Further, if only transnational corporations were required to respect certain human rights obligations, the competition from large national firms might undermine their incentives for compliance were those firms not required to respect similar standards.

Nonetheless, these arguments for the broad application of the Norms to all business enterprises did not deter the working group from deciding in August 2002 that their impact should be minimized with respect to corner bakeries, dry cleaners, and other small, “mom and pop” types of local businesses. The Norms still apply to such businesses, but implementation focuses on transnational corporations, larger businesses, and any firm with connections to transnational corporations.<sup>57</sup>

Closely connected with this issue was the debate over how to handle contractors, subcontractors, suppliers, licensees, and other business partners of transnational corporations. How far up or down the line should businesses be expected to monitor the compliance of their subcontractors and suppliers? Some worry that requiring companies to sever all relationships with companies that do not meet the standards of the Norms will disproportionately affect businesses in developing countries.<sup>58</sup> Further, they argue that enterprises not currently in compliance with the Norms should be encouraged to meet those standards through business relations.

While the ILO Tripartite Declaration does not mention relationships with contractors and suppliers, the OECD Guidelines handle this issue by calling on enterprises to “[e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible” with the OECD Guidelines.<sup>59</sup>

The Norms address the issue of suppliers and contractors by stating:

Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors,

<sup>54</sup> OECD Guidelines, *supra* note 11, pt. I, para. 4.

<sup>55</sup> *Id.*, para. 5.

<sup>56</sup> The manner and extent to which they apply raise further issues. See text at notes 62–65 *infra* (distinguishing between larger and small operations).

<sup>57</sup> The Norms do not establish an exception but de-emphasize implementation as to small, local business: “These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.” Norms, *supra* note 1, para. 21.

<sup>58</sup> Georg Kell & John Gerard Ruggie, *Global Markets and Social Legitimacy: The Case for the ‘Global Compact,’* TRANS-NAT’L CORP., Dec. 1999, at 101, 111 (stating that opponents of earlier proposals for binding standards to be imposed through the World Trade Organization “are deeply concerned that seeking to impose such standards through the trade regime would be an open invitation to exploit them for protectionist purposes, to the grave disadvantages of the developing countries and the trade regime as a whole”).

<sup>59</sup> OECD Guidelines, *supra* note 11, pt. II, para. 10.

subcontractors, suppliers, licensees, distributors, or natural or other legal persons who enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.<sup>60</sup>

Moreover, the Commentary to the Norms states:

Transnational corporations and other business enterprises shall ensure that they only do business with (including purchasing from and selling to) contractors, subcontractors, suppliers, licensees, distributors, and natural or other legal persons that follow these or substantially similar Norms. Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them.<sup>61</sup>

In addition to these provisions, the broad application of the Norms to all businesses resolves this problem. All businesses—regardless of size or relationship to the supply chain—are required to follow the same standards and therefore all business partners must comply of their own accord.

#### *Distinguishing Between Larger and Smaller Corporations*

Some have argued that the Norms create a one-size-fits-all approach that cannot adequately accommodate the diversity of business types, sizes, and activities.<sup>62</sup> In fact, however, the Norms deftly establish a system of relative application based on the strength, size, and other varying factors of a business that bear on its ability to affect human rights. This nuanced approach does not lower the standards for any business; it simply ensures that those with greater power and influence will also have greater responsibilities.

The responsibility to promote and secure human rights applies in varying degrees to the private sector; for example, there are principles directly affecting employees, principles involving public and private business partners and their employees, principles affecting the community and the general human rights environment of that community, principles that can implicate the relationship of a business with public institutions, and principles that can involve concerns for individual human rights, the environment, or the relevant community.<sup>63</sup> The degrees of responsibility suggest that principles for businesses should not just address issues for which a business assumes obvious direct responsibility, such as corporate labor standards, but should also include areas in which it can assume further responsibility, through practices such as outsourcing of products and services. In addition, such principles should address situations in which at least larger businesses can influence governmental actions, through, for example, encouraging the government to improve the human rights environment of a community. A set of human rights principles for businesses can be helpful in all of these contexts. No company, however, no matter how influential, can be asked to replace governments in their primary responsibility for the protection of human rights.<sup>64</sup>

As seen, the Norms do not distinguish between businesses on the basis of the domestic or international nature of their operations, but they do reflect differences between corporations

<sup>60</sup> Norms, *supra* note 1, para. 15.

<sup>61</sup> Commentary, *supra* note 29, para. 15(c).

<sup>62</sup> Joint Views of the IOE [International Organisation of Employers] and ICC [International Chamber of Commerce] on the Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Jan. 14, 2003) (on file with author).

<sup>63</sup> See AVERY, *supra* note 6. For a discussion on levels of responsibility, see Douglass Cassel, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?* 19 FORDHAM INT'L L.J. 1963 (1996); Frey, *supra* note 41; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 11 YALE L.J. 443 (2001).

<sup>64</sup> See AVERY, *supra* note 6.

with regard to their ability to influence markets, governments, stakeholders, and communities, by providing in the first paragraph:

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.<sup>65</sup>

The Norms recognize that the larger the resources of transnational and other businesses, the more opportunities they may have to assert influence. Accordingly, larger businesses, which generally engage in broader activities and enjoy more influence, have greater responsibility for promoting and protecting human rights. Smaller enterprises may not be able to exercise the same amount of influence as larger ones but can still be accountable to similar human rights standards, especially those directly affecting employees and local community conditions. Hence, by taking a flexible approach that holds businesses responsible according to their respective spheres of activity and influence, and by including all businesses, the Norms recognize that all can make a positive contribution through the development, adoption, and implementation of human rights principles.

#### *Content of the Norms*

The Norms reflect and restate a wide range of human rights, labor, humanitarian, environmental, consumer protection, and anticorruption legal principles, but also incorporate best practices for corporate social responsibility. Further, the Norms do not endeavor to freeze standards by drawing on past drafting efforts and present practices; they incorporate and encourage further evolution.

The Norms appear to be more comprehensive and more focused on human rights than any of the international legal or voluntary codes of conduct drawn up by the ILO, the OECD, the European Parliament, the UN Global Compact, trade groups, individual companies, unions, NGOs, and others. The Norms and Commentary provide for the right to equality of opportunity and treatment; the right to security of persons; the rights of workers, including a safe and healthy work environment and the right to collective bargaining; respect for international, national, and local laws and the rule of law; a balanced approach to intellectual property rights and responsibilities; transparency and avoidance of corruption; respect for the right to health, as well as other economic, social, and cultural rights; other civil and political rights, such as freedom of movement; consumer protection; and environmental protection. With respect to each of those subjects, the Norms largely reflect, restate, and refer to existing international norms, in addition to specifying some basic methods for implementation.

As seen above, the very first principle, entitled "General Obligations," states, as clearly as possible, that the Norms are in no manner intended to reduce the obligations of governments to promote, secure the fulfillment of, respect, ensure respect for, or protect human rights.<sup>66</sup> The Norms would be misused if they were employed by a government to justify failing to protect human rights fully or to provide appropriate remedies for human rights violations. This idea is reinforced by the saving clause in paragraph 19, which states that nothing in the Norms should be construed as diminishing states' obligations to protect and promote human rights or as limiting rules or laws that provide greater protection of human rights.<sup>67</sup>

<sup>65</sup> Norms, *supra* note 1, para. 1.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, para. 19.

The Norms contain some basic implementation procedures and anticipate that they may eventually be supplemented by other techniques and processes. First, the Norms expect companies to adopt and implement their own internal rules of operation to ensure the protections set forth in the instrument.<sup>68</sup> Second, the Norms indicate that businesses will be subject to periodic monitoring that is independent and transparent, and includes input from relevant stakeholders.<sup>69</sup> Further, pursuant to concerns raised at the Sub-Commission's meeting in 2002, the working group added a norm calling upon businesses to provide adequate reparations to anyone harmed by conduct that was inconsistent with the standards in the Norms.<sup>70</sup> The addition of this principle indicates the working group's intent not only to prevent conduct that violates human rights standards, but also to repair past harms. It can be further read to indicate the group's intent not only to make a statement about the appropriate conduct of businesses, but also to require action on their part.<sup>71</sup>

### *The Nonvoluntary Nature of the Guidelines*

The Norms as adopted are not a voluntary initiative of corporate social responsibility. The many implementation provisions show that they amount to more than aspirational statements of desired conduct. Further, the Sub-Commission's Resolution 2003/16 called for the creation of a mechanism for NGOs and others to submit information about businesses that are not meeting the minimum standards of the Norms. The nonvoluntary nature of the Norms therefore goes beyond the voluntary guidelines found in the UN Global Compact, the ILO Tripartite Declaration, and the OECD Guidelines for Multinational Enterprises.

Although not voluntary, the Norms are not a treaty, either. Treaties constitute the primary sources of international human rights law. The UN Charter is both the most prominent treaty and the repository of seminal human rights provisions in Articles 1, 55, and 56. The United Nations has further codified and more specifically defined international human rights law in subsequent treaties, which impose legal obligations on those nations that are party to them.

The legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies.<sup>72</sup> The United Nations has promulgated dozens of declarations, codes, rules, guidelines, principles, resolutions, and other instruments, in addition to treaties, that interpret the general human rights obligations of member states under Articles 55 and 56 of the Charter and may reflect customary international law. The Universal Declaration of Human Rights is the most prominent of those instruments; it not only serves as an authoritative, comprehensive, and nearly contemporaneous interpretation of the human rights obligations under the Charter, but also contains provisions that have been recognized as reflective of customary international law.<sup>73</sup>

<sup>68</sup> *Id.*, para. 15.

<sup>69</sup> *Id.*, para. 16.

<sup>70</sup> Paragraph 18 of the Norms, *supra* note 1, provides:

Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, *inter alia*, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

<sup>71</sup> *See id.*, para. 17.

<sup>72</sup> *Cf.*, e.g., International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on Its Sixth Session, in [1954] 2 Y.B. Int'l L. Comm'n 150, UN Doc. A/CN.4/SER.A/1954/Add.1; Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <<http://www.un.org/law/ilc>>.

<sup>73</sup> *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995/96). Other prominent nontreaty human rights instruments are the Standard

Although the interplay between treaty law, nontreaty law, and customary international law is quite complex, for working purposes some observers have identified two types of international law: "hard" law, such as treaties, and "soft" law, such as recommendations.<sup>74</sup> Hard law is clearly intended to create legally binding obligations from the outset, whereas soft law starts in the form of recommendations and over a period of time may be viewed as interpreting treaties and helping to establish custom or may serve as the basis for the later drafting of treaties.

No one can realistically expect business human rights standards to become the subject of treaty obligations immediately. The development of a treaty requires a high degree of consensus among nations. Although a few countries have already indicated their support for the Norms, as yet there does not appear to be an international consensus on the place of businesses and other nonstate actors in the international legal order. The Norms, like numerous other UN recommendations and declarations, have started as "soft" law. As with the drafting of almost all human rights treaties, the United Nations begins with declarations, principles, or other soft-law instruments. Such steps are necessary to develop the consensus required for treaty drafting.<sup>75</sup> Some declarations have not been codified in treaty form because of a lack of consensus.<sup>76</sup>

Any treaty takes years of preliminary work and consensus building before it has a chance of receiving the approval necessary for adoption and entry into force. Even soft-law instruments may take years to develop. For example, the UN Draft Declaration on the Rights of Indigenous Peoples<sup>77</sup> took twelve years to draft in the Sub-Commission's Working Group on Indigenous Populations, has been the subject of deliberations in the Commission's Open-Ended Working Group for another nine years, and is likely to require additional time.

After drafting by lesser UN bodies, such as the Sub-Commission and the Commission, treaties and other instruments are adopted and promulgated by the General Assembly. For example, in 1948 the General Assembly adopted the Universal Declaration of Human Rights, which contained several provisions on economic and social rights; but it took eighteen years for the Assembly to adopt and promulgate the International Covenant on Economic, Social and Cultural Rights<sup>78</sup> as a multilateral treaty in 1966. Soft-law standards, however, may be adopted at any one of the many different levels within the United Nations. For example, the Norms as adopted and promulgated by the working group are similar to the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"

Minimum Rules for the Treatment of Prisoners, ESC Res. 663 C (XXIV) and 2076 (LXII) (May 13, 1977); the Declaration on the Rights of Disabled Persons, GA Res. 3447 (Dec. 9, 1975); the Code of Conduct for Law Enforcement Officials, GA Res. 34/169 (Dec. 17, 1979); the Declaration on the Right to Development, GA Res. 41/128 (Dec. 4, 1986); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, GA Res. 43/173 (Dec. 9, 1988); the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res. 1989/65 (May 24, 1989); the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133 (Dec. 18, 1992); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135 (Dec. 18, 1992); the Declaration on the Elimination of Violence Against Women, GA Res. 48/104 (Dec. 20, 1993); the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993); and the Beijing Declaration and Platform for Action, UN Doc. A/CONF.177/20 & Add.1 (1995).

<sup>74</sup> Dinah L. Shelton, *Compliance with International Human Rights Soft Law*, in *INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS* 119 (Edith Brown Weiss ed., 1998).

<sup>75</sup> The consensus on some declarations has evolved quite quickly to prompt the development of a treaty. For example, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975, GA Res. 3452 (XXX), annex, UN GAOR, 30th Sess., Supp. No. 34, at 91, UN Doc. A/10034 (1975), was followed quite rapidly by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, *opened for signature* Dec. 10, 1984, 1465 UNTS 85 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

<sup>76</sup> See, e.g., Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55, UN GAOR, 36th Sess., Supp. No. 51, at 171, UN Doc. A/36/51 (1981).

<sup>77</sup> Sub-Comm'n, Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

<sup>78</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

adopted by the Working Group on Arbitrary Detention;<sup>79</sup> and as adopted and promulgated at the Sub-Commission level are similar to the resolution entitled "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons."<sup>80</sup> The Norms could be adopted and promulgated (1) by the Commission on Human Rights, like "Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)";<sup>81</sup> (2) by the Economic and Social Council, like the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions";<sup>82</sup> and, of course, (3) by the General Assembly, like the "Declaration on the Elimination of Violence Against Women."<sup>83</sup> Obviously, the higher the UN body and the closer to consensus the vote in adopting soft-law principles such as the Norms, the greater the authority they would obtain.<sup>84</sup> But the principles will derive authority from broad acceptance in international practice as well.

Hence, the legal authority of the Norms now derives principally from their sources in international law as a restatement of legal principles applicable to companies, but they have room to become more binding in the future. The level of adoption within the United Nations, further refinement of implementation methods by the working group, and increasingly broad acceptance of the Norms will continue to play an important role in the development of their binding nature.

### III. IMPLEMENTATION

Generally, the Norms first discuss how they can be implemented by businesses themselves, and then move on to how intergovernmental bodies (such as the United Nations), states, unions, and others can play a role in implementation.<sup>85</sup> These methods and alternatives should be considered by the working group and others as the Norms continue to develop.

#### *Implementation by Business Enterprises*

In the recognition that human rights obligations will be most effective if internalized as a matter of company policy and practice, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights call upon businesses to adopt their substance as the minimum standards for the companies' own codes of conduct or internal rules of operation and to adopt mechanisms for creating accountability within the company.<sup>86</sup>

<sup>79</sup> UN Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum Seekers, UN Doc. E/CN.4/2000/4, Annex 2 (1999).

<sup>80</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons, UN Doc. E/CN.4/Sub.2/RES/1998/26.

<sup>81</sup> UN Commission on Human Rights, Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), UN Doc. E/CN.4/RES/1997/33.

<sup>82</sup> Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res. 1989/65, annex, 1989 UN ESCOR, Supp. No. 1, at 52, UN Doc. E/1989/89.

<sup>83</sup> Declaration on the Elimination of Violence Against Women, GA Res. 48/104, UN GAOR, 48th Sess., Supp. No. 49, at 217, UN Doc. A/48/49 (1993).

<sup>84</sup> See ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 7 (1963); Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"*, 22 MICH. J. INT'L L. 283, 299 (2001).

<sup>85</sup> Additionally, Sub-Commission Resolution 2003/16 establishes a mechanism in the working group for receiving information about violations by companies. See *supra* note 34 and corresponding text.

<sup>86</sup> Norms, *supra* note 1, para. 15. Depending on their resources and capabilities, businesses should consider creating ethics committees and/or appointing ethics officers to provide oversight and counseling, and to promote their code. Employee incentives can also be used to create accountability within a company. For example, conduct consistent with the code could be used as a basis for promotion or wage increases.



The Norms then call upon companies to disseminate these adopted internal rules. Dissemination requires businesses to ensure that the Norms are communicated in a manner that enables all relevant stakeholders to understand their meaning.<sup>87</sup> Promulgation assures that those persons who are most affected by the company's actions know about the company's responsibility to promote and protect human rights.<sup>88</sup> It also makes the responsibilities of the company known to the general public—further legitimating and institutionalizing its responsibilities.<sup>89</sup>

Business enterprises adopting and disseminating<sup>90</sup> their codes of conduct should then implement internal rules of operation in conformity with the Norms. They should train managers and representatives in practices relevant to the Norms and inform all persons and entities that may be affected by dangerous conditions produced by the company.<sup>91</sup>

As mentioned previously, the Norms also address implementation issues with regard to each business's supply chain. First, businesses are to apply and incorporate the Norms into contracts with their business partners, and to ensure that they do business only with others who observe similar standards.<sup>92</sup> The Commentary calls upon businesses to monitor their supply chains to the extent possible.<sup>93</sup>

A significant portion of the Norms and Commentary devoted to implementation involves monitoring. The Norms begin by calling on businesses to conduct internal monitoring and to ensure that monitoring is transparent by disclosing the workplaces observed, remediation efforts undertaken, and other results of such scrutiny.<sup>94</sup> Monitoring is also to take input from relevant stakeholders into account.<sup>95</sup> Unions, of course, are the principal stakeholders with regard to working conditions, and in that context collective bargaining agreements cannot be replaced by the Norms or other mechanisms for corporate social responsibility.

Implementing the Norms also requires making sure that businesses establish legitimate and confidential avenues for workers to file complaints regarding violations, and that they refrain from retaliating against workers that do make complaints.<sup>96</sup> Once again, collective bargaining agreements and union procedures must be maintained. Businesses must record all complaints, take proper steps to resolve them, and act to prevent recurrences.<sup>97</sup>

Businesses are further called on to make periodic reports and to take other measures to implement the Norms fully.<sup>98</sup> The Commentary urges businesses to work in a transparent

<sup>87</sup> Commentary, *supra* note 29, para. 15(a).

<sup>88</sup> Adoption and dissemination by a company could create implicit contractual obligations, which could be used by stakeholders as a basis for advocacy or even litigation if the company fails to meet the standards stated in its public human rights statements or assessments. See Ralph Steinhart, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., forthcoming 2003).

<sup>89</sup> In the United States, it may be in the corporation's interest to adopt and promulgate a corporate code of conduct. A corporation held criminally liable for the conduct of its agents can have its sentence reduced if it has an "effective compliance program" in place designed to detect and deter violations of the law by employees while working for the firm. U.S. SENTENCING GUIDELINES MANUAL §8A1.2, cmt. n.3(k) (1998). That sentencing guideline has been a great incentive for U.S. corporations to establish company codes of conduct.

<sup>90</sup> In addition to making them public, another way of disseminating a company's assessments and enabling them to be compared with the performance of others would be by establishing a standardized numerical system for evaluating performance under the Norms. One such system has been proposed by the secretariat of the Caux Round Table. Caux Round Table Self-Assessment and Improvement Process, at <<http://www.cauxroundtable.org/resources.html>> (visited Sept. 2, 2003). Another means of verification would be through a corporate social audit similar to the current system used by public accountants for auditing financial statements. The results of this independent social audit could then be separately published or attached to the company's annual report.

<sup>91</sup> Commentary, *supra* note 29, para. 15(b), (e).

<sup>92</sup> Norms, *supra* note 1, para. 15; Commentary, *supra* note 29, para. 15(c); text at notes 60–61 *supra*.

<sup>93</sup> Commentary, *supra* note 29, para. 16(d).

<sup>94</sup> Norms, *supra* note 1, para. 16; Commentary, *supra* note 29, para. 16(c).

<sup>95</sup> Norms, *supra* note 1, para. 16; Commentary, *supra* note 29, para. 16(i).

<sup>96</sup> Commentary, *supra* note 29, para. 16(d).

<sup>97</sup> *Id.*, para. 16(e).

<sup>98</sup> Norms, *supra* note 1, para. 15.

manner, by regularly disclosing information about their activities, structure, financial situation, and performance, as well as identifying the location of their offices, subsidiaries, and factories.<sup>99</sup>

Businesses must also engage in periodic assessments and the preparation of impact statements.<sup>100</sup> Assessments and impact statements are to take into account comments made by stakeholders, and the results of any such assessments are to be made available to all relevant stakeholders. In addition, businesses are charged with assessing the human rights impact of major new projects,<sup>101</sup> and where an assessment shows inadequate compliance with the Norms, the Commentary requires the business to include a plan of action for reparation and redress.<sup>102</sup>

### *The United Nations*

The Norms offer several suggestions as to how the United Nations could aid in their implementation. For example, they suggest that they could be used by human rights treaty bodies in the creation of additional reporting requirements for states.<sup>103</sup> They could also be used by most of the human rights treaty bodies as the basis for their efforts to draft general comments and recommendations relevant to the activities of business enterprises.<sup>104</sup> The additional reporting requirements would request that states include reports about the compliance of business enterprises within their respective treaty regimes.<sup>105</sup> Similarly, the treaty bodies could use such a general comment and thus the Norms in preparing their country conclusions and recommendations on states' compliance with already existing treaty provisions. A further mechanism not mentioned specifically in the Norms or the Commentary would be for the four treaty bodies with individual communications procedures to receive communications about governments that have failed to take effective action in response to business abuses under the respective treaties, as elaborated by the Norms as well as related general comments and recommendations.<sup>106</sup>

<sup>99</sup> Commentary, *supra* note 29, para. 15(d).

<sup>100</sup> Norms, *supra* note 1, para. 16; Commentary, *supra* note 29, para. 16(g), (i). Impact statements can be used in efforts to avoid or reduce adverse human rights consequences related to a proposed action. Impact statements include a description of the action, its need and anticipated benefits, an analysis of any human rights impact related to the action, an analysis of reasonable alternatives to the action, and identification of alternative methods of meeting goals and are less detrimental to human rights.

<sup>101</sup> Commentary, *supra* note 29, para. 15(g).

<sup>102</sup> *Id.*, para. 16(h).

<sup>103</sup> *Id.*, para. 16(d); see ANNE BAYEFSKY, *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* (2000); THE FUTURE OF HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000).

<sup>104</sup> For example, the Committee on Economic, Social and Cultural Rights (CESCR) might use the Norms in drafting, adopting, and applying a general comment on the obligations of businesses to protect rights set forth in the International Covenant on Economic, Social and Cultural Rights. See, e.g., CESCR, General Comment 7, The Right to Adequate Housing (Art. 11(1)): Forced Evictions, UN Doc. E/C.12/1997/4; CESCR, General Comment 12, The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5, para. 20; CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health (Art. 17), UN Doc. E/C.12/2000/4, para. 50; CESCR, General Comment 15, The Right to Water, UN Doc. E/C.12/2002/11, para. 23; see also Human Rights Committee, General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (32d session, 1988), in *COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*, UN Doc. HRI/GEN/1/Rev.1, para.1 (1994). The general comments of the two committees are available online at <<http://www.unhchr.ch/tbs/doc.nsf>>.

<sup>105</sup> Article 5 of the Racial Discrimination Convention, *supra* note 22, requires states to regulate the activities of private parties extensively so as to prevent discrimination in areas such as the right to work, the right to form and join trade unions, and the right to housing. The Committee on the Elimination of All Forms of Racial Discrimination could increase its attention to states' regulation of corporations and ask states particularly to report on corporate behavior in light of the Norms. This same requirement could be used for reporting in connection with the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child. See also Sub-Comm'n, Asbjørn Eide, Corporations, States and Human Rights: A Note on Responsibilities and Procedures for Implementation and Compliance, UN Doc. E/CN.4/Sub.2/WG.2/WP.2 (2001).

<sup>106</sup> Mechanisms for individual complaints have been established under four principal human rights treaties. Racial Discrimination Convention, *supra* note 22, Art. 14; Convention Against Torture, *supra* note 75, Art. 22(4), (5); Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302; and Convention

The Commentary mentions implementation by the special rapporteurs or other thematic mechanisms of the UN Commission on Human Rights. They could use the Norms, Commentary, and other relevant international standards to raise concerns about actions by business enterprises within their respective mandates. For example, the Commission's special rapporteur on adequate housing might take note of company actions that have resulted in forced evictions.<sup>107</sup> The Norms and Commentary could possibly serve as the basis for a new thematic procedure on transnational corporations and human rights within the context of the Commission or the General Assembly.

The Commentary discusses how the Norms might assist the United Nations and related institutions in identifying products and services to purchase and businesses with which to develop partnerships.<sup>108</sup> The Norms might also be useful in developing an interactive Web site to post international human rights standards regarding businesses and to receive information from individuals and organizations about the conduct of businesses that are complying with the relevant standards and codes of conduct.<sup>109</sup>

#### *Other Intergovernmental Organizations*

The Norms call on other international and national mechanisms, already in existence or yet to be created, to take part in their implementation through periodic monitoring and verification.<sup>110</sup> For example, intergovernmental bodies like the ILO and the OECD may find the Norms useful in developing, amplifying, or interpreting the standards they apply to businesses. Similarly, the OECD could have recourse to the Norms in the context of its National Contact Points. The World Bank and its constituent institutions have adopted standards for loans relating to their impact on indigenous peoples, the environment, the transfer of populations, sustainable development, and gender equality.<sup>111</sup> The Norms might be helpful in amplifying and interpreting those standards, as well as in encouraging the Bank to adopt additional standards.

The World Trade Organization Agreements, which generally prohibit states from restricting trade, contain several exceptions allowing them to do so when certain conditions are met.<sup>112</sup> For example, in the Agreement on Sanitary and Phytosanitary Measures, the WTO prefers to follow international standards in determining if certain technical regulations that create

for the Elimination of Discrimination Against Women, GA Res. 34/180, Art. 17 (Dec. 18, 1979); *see also* Eide, *supra* note 105, at 12.

<sup>107</sup> The Norms may also be useful to the special rapporteurs on the right to food; on the highest attainable standard of health; on extrajudicial, summary or arbitrary executions; and on the situation of human rights and fundamental freedoms of indigenous people. *See also* Eide, *supra* note 105.

<sup>108</sup> Commentary, *supra* note 29, para. 16(b). For example, the United Nations High Commissioner for Refugees (UNHCR) employs procurement standards that call for consideration of the vendor's environmental practices. UNHCR Guidelines for Environmentally Friendlier Procurement, UN Doc. OSCEA/STS (1996). UNICEF similarly uses procurement standards specifically regarding the suppliers' compliance with national child labor laws and involvement in the sale or manufacture of land mines. *See* UNICEF Procurement Information, at <[http://www.supply.unicef.org/supply/index\\_procurement\\_policies.html](http://www.supply.unicef.org/supply/index_procurement_policies.html)> (visited Oct. 22, 2003). Sub-Commission Resolution 2002/8 explicitly recommended that the Norms be used for the development of procurement standards, *see* Res. 2002/8, *supra* note 28, para. 4(a), but the Sub-Commission chose to focus on other implementation techniques in 2003, *see* Res. 2003/16, *supra* note 2.

<sup>109</sup> For an example of a Web site with an extensive amount of information on business and human rights, *see* Business & Human Rights: A Resource Website, at <<http://www.business-humanrights.org>> (visited Sept. 2, 2003).

<sup>110</sup> Norms, *supra* note 1, para. 16.

<sup>111</sup> WORLD BANK OPERATIONAL MANUAL, OP 4.2, 4.20 (Feb. 2000).

<sup>112</sup> Article XX of the 1947 General Agreement on Tariffs and Trade states ten exceptions in which a state may use trade-restrictive measures, such as to protect public morals; to protect human, animal, or plant life or health; and to preserve exhaustible natural resources. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XX, TIAS No. 1700, 55 UNTS 194.

trade limitations are necessary to protect human, animal, or plant life or health.<sup>113</sup> Similarly, the WTO Agreement on Technical Barriers to Trade states that “[g]eneral terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies.”<sup>114</sup> The Norms could conceivably be considered one set of such standards.

The Norms may also be employed in applying human rights standards on a region-by-region basis to address specific issues.<sup>115</sup> For example, after the passage of the North American Free Trade Agreement (NAFTA), two mechanisms were created to oversee its implementation with regard to environmental and labor standards. Those two mechanisms—the North American Agreement on Environmental Cooperation<sup>116</sup> and the Agreement on Labor Cooperation<sup>117</sup>—do not rely on existing international standards for their decisions; however, the Norms could be used as a basis for fact-finding or interpreting the NAFTA standards.

In 1998 the European Parliament adopted a resolution referring to basic international standards applicable to multinational corporations and calling upon the European Union (EU) to create a legally binding code of conduct for all multinationals headquartered there.<sup>118</sup> In addition, the EU Commission requested that the possibility of creating a European Monitoring Platform (EMP) be studied in connection with the code of conduct. The Commission requested in particular that establishment of the EMP involve participation by northern and southern NGOs, as well as indigenous and local communities, to help ensure that the EMP would protect individuals in host countries everywhere. The EMP, once operating, would be open to receiving complaints from community and/or workers’ representatives, NGOs, individual victims, or other sources from all over the world with regard to actions taken by companies that violated the EU code of conduct. The working group could take lessons from the establishment of the EMP, or the EMP could ultimately decide to use the Norms to help draft or interpret the EU code of conduct. Certainly, the Norms would be more comprehensive and more effective in protecting human rights than the OECD Guidelines, which contain only a single sentence on the subject.

Regional human rights commissions and courts should make use of the Norms as well. For example, two decisions of the European Court of Human Rights involving corporate environmental pollution negatively affecting private and family life under Article 8 of the European Convention on Human Rights have found states liable for not adopting regulations and pursuing inspections to prevent the corporate misconduct.<sup>119</sup> In such situations, regional courts could refer to the Norms in determining states’ obligations and thus encourage states to monitor the conduct of businesses within their borders. Additionally, the African Commission on Human and Peoples’ Rights could have cited the Norms as an additional basis for its

<sup>113</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, Agreement on Sanitary and Phytosanitary Measures, Art. 2.1, in *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 59 (1999).

<sup>114</sup> Agreement on Technical Barriers to Trade, Art. 1.1., in *id.* at 121. The International Standards Organization (ISO) has been recognized as one such standardizing body for establishing specifications for products. The ISO has also prepared standards for management systems and has begun to consider developing corporate social responsibility standards from a consumer perspective. International Standards Organization, Advisory Group Presents Recommendations on Social Responsibility to ISO (Feb. 19, 2003), at <<http://www.iso.org/iso/en/commcentre/pressreleases/2003/Ref846.html>> (visited Sept. 2, 2003).

<sup>115</sup> Regional codes used to address specific issues include the Sullivan Statement of Responsibilities, 4th Application, Nov. 8, 1984, 24 ILM 1464 (1985); Irish National Caucus, MacBride Principles (1984), at <<http://www.irishnationalcaucus.org>>; Social Accountability International, Council of Economic Priorities Accreditation Authority, at <<http://www.cepa.org/Accreditation/Accreditation.htm>> (visited Oct. 25, 2003); Partner’s Agreement to Eliminate Child Labor in the Soccer Ball Industry in Pakistan (ILO/IPEC 1997).

<sup>116</sup> North American Agreement on Environmental Cooperation, Sept. 8, 9, 12, & 14, 1993, 32 ILM 1480 (1993).

<sup>117</sup> North American Agreement on Labor Cooperation, Sept. 8, 9, 12, & 14, 1993, 32 ILM 1499 (1993).

<sup>118</sup> European Parliament, Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, Res. A4–0508/98 (1998), in *Minutes* of Jan. 15, 1999.

<sup>119</sup> *Guerra and Others v. Italy*, 1998–I Eur. Ct. H.R. 2101; *López Ostra v. Spain*, 303–C Eur. Ct. H.R. (ser. A) (1994).

decision against the Nigerian military government for its involvement in, and failure to limit, the activities of oil companies that were violating the economic and environmental rights of Ogoni residents.<sup>120</sup>

### *Unions*

The Commentary encourages trade unions to use the Norms as a basis for negotiating agreements with businesses and monitoring compliance with them.<sup>121</sup> The Norms guarantee freedom of association, including the right to establish and maintain trade unions, as well as effective recognition of the right to collective bargaining pursuant to the relevant conventions of the International Labour Organization. Unions and collective bargaining have a critical role to play in protecting the rights of workers, which should be reinforced by the Norms and other corporate social responsibility standards.

### *Nongovernmental Organizations*

The Commentary also encourages NGOs to use the Norms as the basis for their expectations of business conduct and for monitoring the compliance of businesses.<sup>122</sup>

### *Investors, Lenders, and Consumers*

The Commentary suggests that monitoring could be performed by using the Norms as the basis for benchmarks of ethical investment initiatives and other compliance benchmarks.<sup>123</sup> Self-assessments, assessments by consultants, and independent social audits, inter alia, if made in accordance with the Norms, could be of assistance to individual investors and socially responsible mutual funds in making their investment decisions. Banks and other lending institutions might use this information in deciding whether to make loans. Consumers or consumer groups could apply the Norms to the formulation of socially responsible purchasing decisions.

### *Business Groups or Trade Associations*

The Norms call on industry groups, for example trade associations, to include the Norms in their monitoring.<sup>124</sup> Industry groups might adopt the Norms or a suitable modification of them as their own code of conduct for their members. The Norms could also be used by a consortium of business enterprises as a prerequisite to membership,<sup>125</sup> or to underpin a labeling system for products and services meeting specific standards so that ethical purchasing patterns can be promoted.<sup>126</sup>

<sup>120</sup> See Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96, 2001–2002 Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V, at 31.

<sup>121</sup> Commentary, *supra* note 29, para. 16(c).

<sup>122</sup> *Id.* For an example of a statement by an NGO on human rights responsibilities it believes all companies should follow, see MARK CURTIS, TRADE FOR LIFE: MAKING TRADE WORK FOR POOR PEOPLE (2001); see also *supra* note 37.

<sup>123</sup> Commentary, *supra* note 29, para. 16(c).

<sup>124</sup> *Id.*

<sup>125</sup> For example, Caux Round Table Principles for Businesses (1986), at <<http://www.cauxroundtable.org/principles.html>>; Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry Including Sportswear (Feb. 1998), at <<http://www.cleanclothes.org/codes/cccode.htm>>; and International Chamber of Commerce, Business Charter for Sustainable Development (1991), at <[http://www.iccwbo.org/home/environment\\_and\\_energy/sdcharter/charter/principles/principles.asp](http://www.iccwbo.org/home/environment_and_energy/sdcharter/charter/principles/principles.asp)>.

<sup>126</sup> Although established by an NGO, the SA8000 is an example of a labeling system used to alert consumers to the conditions in which a product was produced. The SA8000, a human rights workplace standard developed by Social Accountability International (SAI), allows retail and brand companies to join the SA8000 Signatory Program when they have demonstrated a commitment to achieving decent working conditions in their supply chains. To become a signatory, each company defines the scope of the operations that it intends to bring into compliance with

### States

Finally, the Norms call upon states to participate in their implementation.<sup>127</sup> States are asked to use the Norms to establish and reinforce the necessary legal or administrative framework as regards the activities of each company with a statutory seat in their country, under whose law it was incorporated or formed, where it has its central administration, where it has its principal place of business, or where it is doing business.<sup>128</sup> The Norms also encourage their application by national courts in connection with the determination of damages and criminal sanctions, and in other respects, as established by national and international law.<sup>129</sup> In addition, in countries where legislation already regulates the activities of business enterprises, courts could use the Norms to interpret legal standards.<sup>130</sup> For example, courts might refer to the Norms in assessing whether a company has provided consumers or investors with adequate information about its products and services.<sup>131</sup> In some countries, compliance with the Norms might be relevant to determining liability for injuries caused by businesses and their officers.<sup>132</sup>

### IV. CONCLUSION

Transnational corporations and other large businesses have acquired a significant amount of power since the trends of globalization started to develop. With this increase in power comes an increase in responsibility. The UN Human Rights Norms for Transnational Corporations and Other Businesses help fill a major gap in the international human rights system, which already addresses the responsibilities of governments, individuals, and armed opposition groups, but has not yet focused on one category of powerful nonstate actors, businesses.

Many companies have acknowledged their human rights obligations and the need to restore confidence in corporate social responsibility. The Norms provide companies that want to be socially responsible with an easily understood and comprehensive summary of their obligations under such systems as human rights law, humanitarian law, international labor law, environmental law, consumer law, and anticorruption law. Accordingly, the Norms help to establish a level playing field for competition. Clarifying their duties may actually benefit businesses, as a growing body of evidence is demonstrating that compliance with human rights standards

SA8000, develops a plan for achieving this goal, and issues annual progress reports to the public subject to verification by SAI before publication. Signatory benefits include the right to use the SA8000 Signatory logo. SAI, How Companies Can Implement SA8000, at <<http://www.cepaa.org>> (visited Oct. 22, 2003).

<sup>127</sup> Norms, *supra* note 1, para. 17.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, para. 18.

<sup>130</sup> See Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603 (2000) (discussing how company human rights codes of conduct may be used by courts to hold companies liable under deceptive advertising laws). Although not mentioned in the Norms or Commentary, states could further encourage or require businesses to file reports about their compliance with the Norms in a central office or could make the filing of such annual reports a requirement of business registration, licensing, securities law, tax law, consumer protection law, etc.

<sup>131</sup> The California Supreme Court recently upheld the right of consumers to sue a large corporation under the state deceptive advertising laws for false statements regarding labor practices and working conditions in factories. *Kasky v. Nike*, 27 Cal.4th 939, 45 P.3d 243 (2002), *cert. granted*, 534 U.S. 3458 (2003), *cert. dismissed as improvidently granted*.

<sup>132</sup> For example, the Norms as a restatement of international legal principles applicable to companies could be used to interpret the human rights violations that fall under the Alien Tort Claims Act, 28 U.S.C. §1350 (1993). Actions under the Act have been brought against several large multinational corporations. *Wiwa v. Royal Dutch Petroleum*, 2002 US Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002); *Abdullahi v. Pfizer*, 2003 US App. LEXIS 20704 (2d Cir. Oct. 8, 2003); *Doe/Roe v. Unocal*, Case Nos. 00-56603, 00-57197 (9th Cir. 2002); *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116 (C.D. Cal. 2001); *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001); *Bowoto v. Chevron*, No. C99-2506 CAL (N.D. Cal. 1999); *Doe v. Gap*, Civ. No. 99-329 (filed C.D. Cal. Jan. 13, 1999).

enhances a company's bottom line. Consumers are often willing to take the human rights conduct of a business into account in making their purchasing decisions. Nowadays, businesses are also more likely to be exposed to liability for conduct that violates human rights standards. Clarification would help businesses to determine whether they should pursue a proposed course of conduct that might expose them to liability, consumer backlash, investor flight, and/or loss of the best and brightest employees. Some companies have already expressed support for the Norms and agreed to apply them in their own operations as a way of affirming their commitment to the Universal Declaration of Human Rights.

Further, the Norms can strengthen the will of governments to insist that businesses avoid human rights abuses. Governments faced with the economic power of large companies will be assisted by the Norms in identifying and thus applying the minimum international standards that relate to the conduct of such companies.

Implementation remains a key issue in the future development of these standards. While the Norms contain rudimentary mechanisms for implementation, the next task for the United Nations, states, businesses, and others will be to continue to search for and elaborate more effective methods of implementation.

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